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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No.

RAPHAEL SANTANA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Raphael Santana, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 20, 1973.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in Appendix A to this brief. The opinion of the District Court is reproduced in Appendix B to this brief.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered April 20, 1973. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Question Presented

Does *Turner v. United States*, 396 U.S. 398 (1970), which declared unconstitutional the presumptions of importation and knowledge of importation contained in 21 U.S.C. 174 with respect to small quantities of cocaine, apply retroactively to guilty pleas, particularly when the guilty plea was entered before 1959 when, as recognized in *United States v. Liguori*, 438 F.2d 663 (2d Cir. 1971) and *Erwing v. United States*, 323 F.2d 674 (9th Cir. 1963), almost no cocaine had been imported into the United States?

Statement of the Case and Facts

The instant application for a writ of habeas corpus pursuant to 28 U.S.C. Section 2255 sought to attack a judgment of conviction rendered in 1957, which conviction formed the predicate conviction for sentencing the defendant as a second narcotics law offender upon a second conviction in 1966.

Specifically, the petitioner was charged in a one-count indictment on June 3, 1957 for violating 21 U.S.C. Sections 173 and 174 in that he unlawfully received, possessed, concealed and facilitated the transportation of approximately ½ ounce of cocaine, knowing the drug was illegally imported into the United States. On July 1, 1957 the petitioner pleaded guilty to

the indictment in the United States District Court for the Southern District of New York (Sugarman, D.J.), and was sentenced on the same day to five years in jail.

The petitioner is presently incarcerated in the United States Penitentiary, Atlanta, Georgia, pursuant to a judgment of conviction entered in the United States District Court for the Eastern District of New York on February 17, 1966, sentencing him to 15 years in jail as a second federal narcotics law offender, the predicate narcotics conviction being the 1957 conviction.

The instant petition, pursuant to 28 U.S.C. Section 2255, sought to set aside the 1957 conviction on the ground that the evidentiary presumption of knowledge of importation was declared unconstitutional with respect to small amounts of cocaine by *Turner v. United States,* 396 U.S. 398 (1970), and that *Turner* applied retroactively to guilty pleas, particularly where the plea was entered before 1959, a time when almost no cocaine was imported into the United States. Thus, petitioner contended, absent use of the presumption, he could not be guilty of the federal crime with which he was charged.

The writ was denied in the United States District Court for the Southern District of New York (Cooper, D.J.) on August 16, 1972, and the denial was affirmed on appeal by the Court of Appeals for the Second Circuit.

Reasons for Granting the Writ

I. *Turner v. United States,* 396 U.S. 398 (1970), which declared unconstitutional the statutory presumption of knowledge of importation in 21 U.S.C. 174 with respect to small amounts of cocaine, should apply retroactively to guilty pleas,

particularly where, as in the present case, the plea was entered before 1959 when almost no cocaine was imported into the United States. In the absence of the unconstitutional presumption, petitioner had an absolute defense to the federal crime with which he was charged.

In *Turner v. United States,* 396 U.S. 398 (1970) the Supreme Court held that the presumptions of importation and knowledge of importation contained in 21 U.S.C. 174 are unconstitutional when applied to small quantities of cocaine. In *United States v. Gonzales,* 442 F.2d 698 (2d Cir. 1971) the Court decided that where more than 1 kilogram of cocaine was involved, the Section 174 presumptions could be rationally utilized, since an individual domestic source seldom had more than one ounce in stock. Possession of a kilogram, therefore, would require an unreasonable number of thefts from domestic sources. On the other hand, the court in *Gonzales* held that where the quantity in issue was "of the order of 10 grams", the presumptions could not be utilized at all. In the present case, the petitioner was charged with ½ ounce of cocaine, or 14.75 grams, an amount, under *Gonzales,* which would not rationally allow use of the presumptions. Indeed, in *United States v. Liguori,* 438 F.2d 663 (2d Cir. 1971) the Second Circuit noted that "almost no cocaine had been imported into the United States, legally or illegally, before 1959" (also see *Erwing v. United States,* 323 F.2d 674 (9th Cir. 1963)). Since the present case arose in 1957, it is obvious that the Section 174 presumptions could not be rationally applied to petitioner's case, all cocaine at that time being domestically manufactured. Thus, in view of these findings in *Erwing* and *Liguori,* it is clear that Santana was not guilty of violating Section 174 by possessing cocaine in 1957, since the drug was not then imported.

In *United States v. Liguori,* 438 F.2d 663, *supra* the court also decided that the *Turner* decision was retroactive, and that relief under 28 U.S.C. 2255 would be available to defendants tried before *Turner,* though they did not object to the presumption being charged on trial. The court, however, specifically left open the question of whether *Turner* would benefit defendants who pleaded guilty, as the petitioner Santana did. Yet a second *Liguori* case [*United States v. Liguori,* 430 F.2d 842 (2d Cir. 1970)] indicates that *Turner* should indeed apply retroactively to guilty pleas, at least where, as here, the Section 174 presumptions would have been the only way to prove illegal importation and knowledge of importation on the part of the defendant. In this *Liguori* decision the Second Circuit reviewed the retroactivity of that part of *Leary v. United States,* 395 U.S. 6 (1969) dealing with a violation of the marijuana transfer tax, and held that *Leary* was retroactive to guilty pleas. *Liguori* reasoned that the defendant "certainly would not have pleaded guilty had he known of his right to assert the privilege as a complete defense" (430 F.2d at 849).* Similarly, had the defendant here known that the presumptions of Section 174 could not constitutionally be utilized at trial, as *Turner* later decided, he would have had a complete defense to the charge, and would obviously not have

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*Moreover, the fact that the defendant pleaded after plea bargaining does not foreclose relief (*United States ex rel. Ennis v. Fitzpatrick,* 438 F.2d 1202 (2d Cir. 1971), nor, of course, does the fact that Santana has served his sentence, since as a second offender, he is presently undergoing collateral consequences as a result of the 1957 conviction *[Sibron v. New York,* 392 U.S. 40, 50-8 (1968); *United States v. Houssein,* 326 F.S. 1194 (DC Md 1971)].

pleaded guilty. For while in some cases there might be proof of illegal importation and knowledge of importation independent of the 174 presumptions, there could have been no such evidence in the hands of the Government in this case, since, according to *Liguori* (438 F. 2d 663, at 6, *supra)* and *Erwing* (323 F.2d 674, *supra)* there was no importation of cocaine into this country at the time the petitioner was convicted. Consequently, the elements of importation and knowledge could only be shown by using presumptions, valid at the time, but now realized to be unconstitutional. Accordingly, lack of importation and knowledge of importation was as much an absolute defense for Santana, as the privilege against self-incrimination was to *Leary*. And since 2255 relief was granted in *Liguori* (430 F.2d 842, *supra)* where a guilty plea was entered before *Leary* was decided, so too here the benefit of *Turner* should be extended to pre-*Turner* guilty pleas where the unconstitutional presumption would have been the sole proof of the elements of importation and knowledge.

Indeed, the fact that the defendant would not have pleaded guilty had he known that the possession count was defective under *Leary* was a major feature cited by the court in *Liguori* (430 F.2d 842, *supra)* to distinguish the case from the Supreme Court guilty plea decisions in *McMann v. Richardson,* 397 U.S. 759 (1970); *Brady v. United States,* 397 U.S. 742 (1970) and *Parker v. North Carolina,* 397 U.S. 790 (1970). And although the court below relied on *McMann, Brady* and *Parker* to deny relief to Santana, its reliance is inappropriate. In the *McMann* trilogy the Supreme Court held that a guilty plea is not involuntary if based on competent contemporary advice of counsel regarding the admissibility of a confession or validity of a death sentence after conviction by a jury, even if later Supreme Court cases rendered the confession or the death

sentence invalid. However, the court in *Liguori* (430 F.2d 842, *supra)* pointed out that the defendant would not have pleaded had he known of the absolute defense, thus avoiding the concern in *McMann v. Richardson,* regarding contemporary judgments about the strength of the Government case or the possibility of leniency (430 F.2d at 849). Here, it is equally certain that Santana would not have pleaded guilty had he known that his valid and absolute defense could not be controverted by the unconstitutional presumptions later struck down in *Turner.*

Indeed, while it is sometimes difficult to fathom which types of cases will be retroactive and which will not be (see e.g., discussion in *Vaccaro v. United States,* 461 F.2d 626 (5th Cir. 1972)), it is at least certain that where there is "a clear danger of convicting the innocent" retroactive effect will be accorded a new ruling. *Teban v. Sbott,* 382 U.S. 406 (1966). In the present case, in view of the fact that no cocaine had been imported before 1959, Santana was actually innocent of the federal crime to which he pleaded guilty. It is this factor in particular that the Court of Appeals below failed to recognize. While after 1959 a judgment regarding the sufficiency of the evidence of importation might have to be made by a defendant contemplating a guilty plea, prior to 1959 there was no proof of illegal importation at all.

In essence, then, involuntariness of the plea is not really the issue here, as it was in the *McMann* trilogy. Rather, Santana had a complete and good defense to the crime, since the cocaine he possessed in 1957 was not, under *Liguori* (438 F.2d 663, *supra)* and *Erwing* (323 F.2d 674, *supra)* illegally imported. However, he was induced to plead guilty by the threatened, through at the time recognized use of presumptions now seen as uncon-

stitutional. Had *Turner* been in effect, Santana's innocence of violating the Federal charge would have been established. Consequently, full retroactivity is necessitated in the present case to correct a flaw in the fact finding process, for the existence of the presumptions in this case "undermined the very integrity of the . . . process that decided the petitioner's fate" *(Witherspoon v. Illinois,* 391 U.S. 510 (1968); *Roberts v. Russell,* 392 U.S. 293 (1968); *Berger v. California,* 393 U.S. 314 (1969). Retroactivity must therefore be accorded *Turner* despite the guilty plea, at least in regard to convictions for possession of small amounts of cocaine before 1959.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A
Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
For The Second Circuit

No. 436—September Term, 1972.
(Argued February 14, 1973 Decided April 20, 1973.)
Docket No. 72-2075

RAFAEL SANTANA,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Before:

FRIENDLY, *Chief Judge*,
OAKES, *Circuit Judge*, and DAVIS, *Judge*.*

Appeal from a denial by Irving Ben Cooper, *Judge*, of the United States District Court for the Southern District of New York of appellant's motion pursuant to 28 U.S.C. § 2255 to set aside a 1957 judgment of conviction for violation of 21 U.S.C. §§ 173-74 on the ground that appellant's guilty plea was

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*Of the United States Court of Claims, sitting by designation.

influenced by subsequently invalidated evidentiary presumptions.

Affirmed.

JOSEPH I. STONE, New York, New York, *for Appellant.*

NICHOLAS FIGUEROA, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, John W. Nields, Jr., Assistant United States Attorney, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

This appeal raises the question whether a judgment on a plea of guilty may be set aside where the use at trial of the evidentiary presumptions in the statute is subsequently invalidated. The plea here was to an indictment charging receipt of illegally imported cocaine, 21 U.S.C. § 174. The statutory presumptions in effect at the time of appellant's plea in 1957 were that importation of the cocaine and knowledge of that importation could be inferred from possession. These presumptions were invalidated in *Turner v. United States*, 396 U.S. 398 (1970), which held that possession at least of less than one gram of cocaine (14.68 grams of a cocaine-sugar mixture of which 5 per cent was cocaine) did not warrant the statutory presumptions, since considerable cocaine (as opposed to heroin) is manufactured in the United States. 396 U.S. at 418-19 and n.39. While appellant has long since served his five-year mandatory sentence on this charge, he seeks to set aside his conviction by writ of habeas corpus, 28 U.S.C. § 2255, denied below, because he has subsequently been charged with other drug offenses—indeed, was sentenced to a term of 15 years on

February 17, 1966, in a second offender status.

Because appellant's original charge related to possession of only one-half ounce of cocaine or 14.75 grams, he contends that he fell within the *Turner* case's protection from the presumptions. Our own *United States v. Gonzalez*, 442 F.2d 698, 709 (2d Cir.) (en banc), *cert. denied sub nom. Ovalle v. United States*, 404 U.S. 845 (1971), refers to small amounts as "of the order of 10 grams." For purposes hereof we will assume that appellant's case is identical to Turner's in amount and time. We also recognize that we held in *United States v. Liguori*, 438 F.2d 663 (2d Cir. 1971) *(Liguori II)*, that *Turner* is retroactive, and that failure to object to the use of the presumptions during trial would not have affected a waiver of the *Turner* issue.

But here, unlike *Liguori II*, appellant did not go to trial, he pleaded guilty, and the *Liguori II* court specifically declined to express any opinion on the validity of convictions without trial. 438 F.2d at 670. Appellant argues, however, that since his plea was based upon his (or presumably his attorney's) knowledge that the now invalidated presumptions could be used against him at trial, he should now be allowed to withdraw that plea.

McMann v. Richardson, 397 U.S. 759 (1970), and *Brady v. United States*, 397 U.S. 742 (1970), require us to reject appellant's claim. In *McMann* the defendant's claim that his guilty plea was induced by a coerced confession—inadmissible under later decisions—was rejected, the Court saying that he was "convicted on his counseled admission in open court that he committed the crime charged against him" and that the fact that his lawyer might have advised him otherwise had "no bearing on the accuracy of the defendant's admission that he

committed the crime." 397 U.S. at 773. So, too, in *Brady* the Court rejected the defendant's claim that his guilty plea to a kidnapping charge was induced by a statutory provision—later invalidated—permitting imposition of the death penalty only upon a recommendation of a jury, the Court saying, in even broader language, that "a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." 397 U.S. at 757.

The Court in *McMann* and *Brady*, while recognizing that subsequent judicial actions might have changed the thinking that resulted in the guilty pleas there involved, nonetheless refused to find the pleas invalid for a combination of reasons. First, the plea was made in open court on advice of competent counsel and the defendant fully recognized that he would sustain severe punishment because of his plea. Nothing in the record of those cases indicated that the pleas were either inaccurate or unreliable indicia of guilt. *Brady*, 397 U.S. at 758. Second, the Court felt that ordering a new trial years after the original sentencing would make it very difficult for both the accused and the State to marshal the relevant evidence. Third, the State would be faced with reopening a very large number of cases in which guilty pleas had been entered. *United States v. Liguori*, 430 F.2d 842, 848-49 (2d Cir. 1970), *cert. denied*, 402 U.S. 948 (1971) *(Liguori I)*. The case now before us presents these same three difficulties. (1) Here the defendant voluntarily pleaded guilty on advice of counsel. Although he may have been influenced by the greater likelihood of conviction stemming from the statutory presumptions of importation and knowledge in the later invalidated 21 U.S.C. § 174, that increased likelihood of conviction is exactly parallel to the increased likelihood of conviction stemming from the admission of the

coerced confession in *McMann*. (2) It would be for all practical purposes impossible to have a retrial that was other than a sham when the alleged offense took place 15 years ago. (3) It would place an extraordinary burden on the Government to have to retry the substantial number of pre-*Turner* 21 U.S.C. § 174 convictions based on guilty pleas which would likely result from a reversal in this case.

Nor does the decision in *Liguori I, supra*, avail appellant. There the defendant had pleaded guilty to a violation of the marijuana transfer tax act, to the prosecution of which, as was later held by *Leary v. United States*, 395 U.S. 6 (1969), a timely assertion of the privilege against self-incrimination was a complete defense. *Liguori I* held that a plea of guilty was not a waiver of the privilege and accordingly reversed the conviction, distinguishing *McMann, Brady* and *Parker v. North Carolina*, 397 U.S. 790 (1970), on the three bases discussed above. A still more important distinction is that in *Liguori I*, as the court there pointed out, it was not a question whether the unconstitutional statute had tended to influence the defendant to plead guilty, but rather whether the statute took away the privilege against self-incrimination by imposing a statutory scheme the purpose of which was to punish for failing to incriminate oneself. 430 F.2d at 849. Thus, in *Liguori I*, unlike this case and the *McMann, Brady* and *Parker* trilogy, the punishment would have been unjustified even if the procedures leading to the conviction were correct. 430 F.2d at 849.

This case fits squarely within *McMann, Brady* and *Parker*.

Judgment affirmed.

APPENDIX B
Opinion of the District Court

RAPHAEL SANTANA v. UNITED STATES

72 Civ. 601

U.S.A. v. RAPHAEL SANTANA

(Re: 57 Cr. 153-81)

Defendant's application to set aside his conviction is denied in all respects. He claims the recent decisions in *Turner v. United States,* 396 U.S. 398 1970) and *United States v. Liguori,* 438 F.2d 663 (2d Cir. 1971) render invalid his guilty plea (entered July 1, 1957) to unlawful possession of illegally imported cocaine.

The papers before us contain no affidavit by defendant. His counsel (who represented him at the plea) offers us his own affidavit which we find barren of factual support for the claim that the illegal presumption of importation and knowledge of importation were in fact the basis, in whole or in part, of defendant's guilty plea. The petition, consisting solely of defense counsel's general allegations, lacks the necessary factual support and is therefore defective on its face.

We take the position that since there was no trial, the challenged presumption was neither necessarily operative nor was it applied. Defendant's guilty plea does not become involuntary because one of the factors that "might" have been weighed is now eliminated. The fact that defendant did not anticipate the *Turner* decision does not necessarily "impugn the

truth or reliability of his plea."

Brady v. United States, 397 U.S. 742 (1970). See also *McMann v. Richardson*, 397 U.S. 759 (1970).

We note parenthetically that defendant has already completed the sentence imposed under this conviction.

SO ORDERED:

IRVING BEN COOPER

New York, N.Y.
August 16, 1972

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-136

RAPHAEL SANTANA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question is whether the decision in *Turner* v. *United States*, 396 U.S. 398, is to be applied retroactively to overturn a voluntary plea of guilty.

On July 1, 1957, in the United States District Court for the Southern District of New York, petitioner pleaded guilty to one count of unlawful possession of one-half ounce of cocaine, knowing the drug was illegally imported into the United States, in violation of 21 U.S.C. (1964 ed.) 173 and 174. He was sentenced to a term of imprisonment for five years.

Petitioner is presently incarcerated in the United States Penitentiary, Atlanta, Georgia, pursuant to a judgment of conviction entered in the United States District Court for the Eastern District of New York, sentencing him to fifteen years in jail as a second federal narcotics law offender, the first conviction being the one in 1957.

Petitioner subsequently filed a motion pursuant to 28 U.S.C. 2255, seeking to set aside his 1957 conviction on the ground that the evidentiary presumption of knowledge of importation was declared unconstitutional with respect to small amounts of cocaine by *Turner* v. *United States*, 396 U.S. 398 (1970), and that *Turner* should be applied retroactively to guilty pleas. Petitioner's motion was denied (Pet. App. B). The court of appeals affirmed (Pet. App. A).

Petitioner's contention was thoroughly analyzed below and properly rejected by the court of appeals, relying essentially on this Court's decisions in *McMann* v. *Richardson*, 397 U.S. 759, and *Brady* v. *United States*, 397 U.S. 742.[1] We rely on that opinion in urging that the petition for a writ of certiorari be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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[1] See also *Tollett* v. *Henderson*, No. 72-95, decided April 17, 1973.